

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**CHARLOTTE GARRISON,  
Grievant,**

**v.**

**Docket No. 2019-0669-DVA**

**DEPARTMENT OF VETERANS ASSISTANCE,  
Respondent.**

**DECISION**

Grievant, Charlotte Garrison, filed this action on December 12, 2018, against her employer, West Virginia Nursing Facility, challenging a suspension without pay. Grievant seeks to be made whole in every way including back pay with interest and all benefits restored. This action was filed directly to Level Three of the grievance process. A Level Three evidentiary hearing was conducted before the undersigned on June 4, 2019, at the Westover office of the Grievance Board. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Mark S. Weiler, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals July 18, 2019.

**Synopsis**

Grievant is employed by Respondent as a Licensed Practical Nurse at the West Virginia Veterans Nursing Facility located in Clarksburg, West Virginia. Grievant failed to provide a resident with a wheelchair that he requested to attend a church service on another floor of the facility. Record established that the Social Worker Supervisor

investigated the incident and substantiated the allegation of neglect and psychological abuse of the resident. Respondent demonstrated by a preponderance of the evidence it was justified in suspending Grievant concerning her behavior in handling a resident in the Alzheimer's/Dementia unit of the facility.

The following Findings of Fact are based upon the record of this case.

### **Findings of Fact**

1. Grievant is employed by Respondent as a Licensed Practical Nurse at the West Virginia Veterans Nursing Facility located in Clarksburg, West Virginia.

2. During the time period in question, Grievant worked in the Alzheimer's/Dementia Unit as one of the shift nurses in charge.

3. Grievant was suspended effective November 29, 2018, pending the results of an investigation into violations of a Resident's Bill of Rights as it pertained to a resident on the AD Unit.

4. Grievant was alleged to have denied a resident's right to attend religious services by not honoring a request for use of a wheelchair to attend the service.

5. According to the Adult Protective Services Mandatory Reporting Forms and witness statements, the resident wanted the use of a wheelchair to attend bible study. Grievant denied the resident the use of a wheelchair. Grievant told the resident to use a walker or a cane. The resident indicated that his legs were hurting. The resident became upset and did not go to the church service.

6. The West Virginia Veterans Nursing Facility was obligated to report the incident to the Office of Health Facility Licensure and Certification and Adult Protective Services.

7. The investigation was supervised and conducted initially by Michelle Carouthers, AD Unit Director, and then by Pamela Hedrick, Supervisor of Social Services.

8. Cherrie Dunn, a Recreation/Activities Assistant, has been employed at the West Virginia Veterans Nursing Facility for more than ten years. Ms. Dunn has worked in the AD Unit for more than three years.

9. Ms. Dunn reported that on or about November 27, 2018, she approached the resident and asked if he wanted to attend bible study. The resident said yes, so long as he would be able to use a wheelchair. The resident reported that he was not feeling well. In the past, Ms. Dunn has used a wheelchair to transport the resident to bible study and other activities inside the building.

10. Grievant said the resident could not go to bible study unless he used a cane or walker.

11. The resident has an order in his plan of care for the use of a wheelchair. The resident was upset over missing the religious activity. Ms. Dunn was concerned over the Grievant's essential denial of the resident's right to attend this activity.

12. Brandy Hall, AD Unit Office Assistant, also serves as a Health Service Worker in the AD Unit. Ms. Hall confirmed that the resident was seeking the use of a wheelchair to go to the bible study. Ms. Hall confirmed that Grievant rejected this request. The resident indicated that his legs were hurting and he did not think he could make it to the activity without a wheelchair.

13. Ms. Hall confirmed it was normal for the resident to use a wheelchair to go to activities. Ms. Hall was hesitant to go against Grievant's decision denying the resident use of a wheelchair since she was the nurse in charge.

14. The resident, being upset, told Grievant that he felt she always needed to control everything. The resident later tried to apologize to Grievant but was turned away. This was observed by Martha Scott, AD Unit Health Service Worker, also explaining that Grievant appeared aggravated with the resident.

15. The resident's Admission Record states, *inter alia*, the following:

"History of Falling"

"Other Abnormalities of Gait and Mobility"

16. The resident's Admission Orders and Plan of Care includes the following:

"May use wheelchair PRN due to gait disturbance"

"Activity level: up as tolerated; encourage activities"

"Special Orders: Agitation: Redirect and reassure"

17. Under the West Virginia Veterans Nursing Facility Resident Bill of Rights, a resident has the right to receive services in the facility with reasonable accommodation of individual needs and preferences. Facility management must care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life. Residents have the right to choose activities and make choices about aspects of their lives in the facility that are significant to the residents.

18. Pamela Hedrick substantiated the allegations of neglect and psychological abuse based upon the witness statements, the interview with the resident, and the Resident's Bill of Rights. Ms. Hedricks explained that one of the resident's favorite activities was to go to religious services.

19. The West Virginia Veterans Nursing Facility Employee Conduct Policy provides that discrimination in any form is prohibited. Failure to reasonably accommodate a disabled resident is a violation of the policy.

20. Grievant's prior disciplinary history includes being suspended in 2015 for mental or emotional abuse of a resident. At that time, Grievant underwent retraining. Pamela Hedrick met with Grievant and reviewed with her the Resident's Bill of Rights. On or about April 6, 2015, Grievant received a written warning concerning engaging in workplace harassment of an agency nurse. On November 27, 2018, Grievant was given a verbal warning by the AD Unit Director for insubordination.

21. On or about December 20, 2018, Interim Administrator Sherri Reed met with Grievant at a predetermination meeting. Ms. Reed addressed the incident involving the resident and gave Grievant the opportunity to respond.

22. During the predetermination meeting, Grievant indicated that anyone could have gotten the resident a wheelchair. Grievant said it was a busy day on the floor and she had a lot going on. Grievant denied any fault or responsibility.

23. Ms. Reed did not consider Grievant's explanation to be valid. Grievant had access to the resident's chart. Grievant should have known there was an order for a wheelchair. Grievant should have directed staff to get the resident a wheelchair.

24. Ms. Reed set the suspension at forty working hours. Grievant's annual leave was credited for eighty hours since she took such leave to cover her suspension pending investigation.

25. Grievant acknowledged that Cherie Dunn came to the Nurses' Station and asked if the resident could have a wheelchair.

26. Grievant told the resident that he could use a walker or cane to go to the activity. The resident did not specifically ask her for a wheelchair.

27. Grievant acknowledged that the resident does have a history of falling.

## Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). “A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying determines the weight of the testimony.” *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, “[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

The record presented as a whole demonstrates that Grievant was not credible with the entirety of her testimony. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep’t of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep’t of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An administrative law judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*,

Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

The record of this case provided the testimony of several unbiased and disinterested witnesses which clearly established that the resident in question did request a wheelchair to go to an activity because his legs were hurting. By contrast, Grievant's denials of such a request were not credible. During the evidentiary hearing, Grievant acknowledged that Cherie Dunn asked her if the resident could have a wheelchair. Grievant acknowledged that Ms. Dunn came to the Nurses' Station seeking a wheelchair for the resident. Yet, Grievant also testified that Ms. Dunn did not request or ask her for a wheelchair. Grievant's testimony at the evidentiary hearing was contradictory and inconsistent.

Grievant claimed at the evidentiary hearing that the resident did not use a wheelchair to go to in-house activities. The undersigned heard from several credible witnesses that it was normal for the resident to use a wheelchair in such situations. Grievant defended her actions by claiming that the resident did not specifically ask for a

wheelchair. It is basically undisputed in the record that the resident did ask the Recreation Assistant for a wheelchair. This request was communicated to Grievant. As the responsible nurse in charge, this communication should have been sufficient for Grievant to provide the resident with a wheelchair so that he could attend the church service.

In addition, it is not credible for Grievant to deny knowing there was an order in the resident's plan of care calling for a wheelchair if needed. As one of the shift nurses in charge of the AD Unit, it was her responsibility to know the resident's condition and plan of care. Grievant's claim at the evidentiary hearing was that she knew more about the resident's condition than other staff. If true, Grievant would have known that the resident had a history of falling and she would have known about the physician's order. The undersigned must come to the conclusion that Grievant was not a credible witness at the evidentiary hearing.

The record established that the resident in this case had a history of falling, with abnormalities of gait and mobility. The resident's Plan of Care includes an order for use of a wheelchair. The record further established that Cherie Dunn, Recreation/Activities Assistant, asked the resident if he wanted to go to bible study, which is one of the resident's favorite activity. The resident's room is located on the AD Unit on the first floor of the facility. The church service was scheduled to take place outside of the AD Unit on the third floor.

The resident told Ms. Dunn he wanted to go to bible study provided he could use a wheelchair. The resident reported that his legs were hurting and that he did not feel like walking to the church service. Ms. Dunn has used a wheelchair to transport the resident to bible study and other in-house activities. Brandy Hall and Pamela Hedrick



confirmed that it was normal for the resident to use a wheelchair to attend activities. Ms. Dunn requested a wheelchair for the resident. Grievant acknowledged the request. Grievant indicated that the resident could go to bible study if he used a cane or walker. The resident, being upset, told Grievant that he felt she always needed to control everything. The resident later tried to apologize to Grievant but was turned away.

Grievant, as the supervisory shift nurse in charge, did not instruct any of the staff to get the resident a wheelchair. The record supports a finding that Grievant should have made certain that the resident's request for a wheelchair was honored. If Grievant did not think the resident needed a wheelchair, she should have conferred with the Director of Nursing, the AD Unit Director, or the attending doctor. Grievant did not have the authority to alter the plan of care on her own.

Respondent has proven by a preponderance of the evidence that Grievant's behavior violated the Resident's Bill of Rights and other applicable regulations concerning long-term care facilities. The resident had the right to receive services in the facility with reasonable accommodations of individual needs and preferences. The resident had the right to be free from humiliation and involuntary seclusion. Grievant is also under a duty to care for residents in a manner and environment that promotes enhancement of each resident's quality of life.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees

Grievance Board, 156 C.S.R. 1 § 156-1-3 (2018); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An administrative law judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

3. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

4. Respondent has met its burden of proof by a preponderance of the evidence, and proven the charge against Grievant that led to her suspension. Its decision to impose a forty-hour unpaid suspension was not such an excessive penalty as to be arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2018).

**Date: August 7, 2019**

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**Ronald L. Reece**  
**Administrative Law Judge**